IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1941

JAMES INENDINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner was deprived of his Constitutional right to a fair trial by the prosecutor's conduct during closing argument, telling the jurors the government witnesses "told you the truth", which amounted to vouching for the credibility of government witnesses, and further telling the jury that the government was "sure . . . they have the evidence to convict . . ."

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A. This error was aggravated and compounded when the court admonished the jurors, the night before the anticipated articles in fact appeared, that the court "knew" the jurors would tell the court they had not read the anticipated articles.

B. Similarly, defendant was further deprived of a fair trial and a fair opportunity to lay a foundation in the record as to possible juror prejudice, by the court's insistence on questioning the jurors en masse rather than individually as to whether or not any of them had read the extremely prejudicial articles which in fact appeared in two local newspapers 22

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SUPREME COURT OF THE UNITED STATES

October Term, 1978

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JAMES INENDINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, James Inendino, respectfully prays that a writ of certiorari be issued to the Court of Appeals for the Seventh Circuit, to review its decision affirming judgments of conviction in the United States District Court, Northern District of Illinois, Eastern Division,

adjudging him guilty of transporting forged checks in interstate commerce and conspiracy so to do.

JUDGMENTS AND OPINIONS BELOW

The Court of Appeals for the Seventh Circuit affirmed petitioner's convictions in an "Unpublished Order" (per Circuit Rule 35) dated May 31, 1979. (A copy of the Court of Appeals' Unpublished Order is attached hereto as Appendix A.) No petition for rehearing having been filed, this Petition is timely filed within 30 days from that date.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered on May 31, 1979. This Petition for a Writ of Certiorari is filed within 30 days of that date. Jurisdiction is invoked under 28 U.S.C.

1254 and Rule 22.2 of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner deprived of his constitutional right to a fair trial by the prosecutor's conduct during closing argument, which amounted to vouching for the credibility of government witnesses, and telling the jury that the government was "sure . . . they have the evidence to convict . . ."?

2. Did the court commit prejudicial error in refusing to sequester the jury upon defense request and representation that prejudicial newspaper articles were to be (and which in fact were) published during the trial?

A. Was not this error aggravated and compounded when

the court admonished the jurors, the night before the anticipated articles in fact appeared, that the court "knew" the jurors would tell the court that they had not read the anticipated articles?

B. Similarly, was not defendant further deprived of a fair trial and a fair opportunity to lay a foundation in the record as to possible juror prejudice, by the court's insistence on questioning the jurors en masse rather than individually as to whether or not any of them had read the extremely prejudicial articles which in fact appeared in two local newspapers?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial by an impartial jury . . .; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, . . ."

STATEMENT OF THE CASE

Petitioner, James Inendino (hereafter, defendant) was charged in 12

counts of a 13 count indictment (76 CR 876, which superseded an identically numbered indictment in which defendant was not named)[1] with conspiracy to transport falsely made and forged checks in interstate commerce (Count 1) and with the substantive offenses in so doing (Counts 2 through 12). (R. 1)[2]

The jury found defendant not guilty on Count 12, but guilty on Counts 1 through 11. (R. 4)

---

1. Indictment No. 76 CR 876, returned by the grand jury on July 27, 1976, named as defendants Sam Bennie Capitano, Thomas B. McKillip, Michael R. Moyer, Charles Phebus, Eugene Phebus, John Phebus, and Harold Scully. A superseding indictment bearing the same number was filed on March 3, 1977, removing defendant Scully and adding Inendino as a co-defendant.

2. "R." refers to the Record on Appeal; "Tr." to the Transcript of Proceedings.

The court sentenced him to 5 years in custody on each of Counts 1 through 11, to run concurrently. (R. 7)

SHORT STATEMENT OF FACTS

Specific facts essential to an understanding of the questions raised herein are set forth within the specific Points which follow, and are not repeated here to avoid unnecessary duplication.

Eugene Phebus, a convicted felon, was charged in the indictment with co-defendants as set out in n. 1. After being so indicted, he made statements to the government upon which defendant Inendino was indicted (in place of one Scully, who testified for the government). Phebus testified that he met with his brother, Charles Phebus, in an auto in a parking lot in northern Indiana on August

31, 1974, and while in the auto he talked with Thomas McKillip and defendant Inendino, telling them that the Phebus brothers had an arrangement with a person in Florida from whom they obtained checks of the John Hancock Insurance Co. Phebus explained that he would undertake a partnership with McKillip and Inendino in that he would supply the checks and Inendino and McKillip were to supply persons who would cash the checks, expense money, false identifications and protection. Phebus stated that McKillip and Inendino agreed.

Thereafter, the testimony was that McKillip obtained check passers, Schremser and Hull, and subsequently Scully. There was no evidence that Inendino either supplied money, false identifications, obtained any check passers or performed

any affirmative acts pursuant to the supposed conspiracy.

All of the government witnesses were vigorously and aggressively cross-examined by counsel for Inendino.

In opening remarks to the jury, Inendino's counsel advised that Inendino was framed. There was no claim that the government attorneys framed him. And in closing argument of Inendino, he did not claim government attorneys framed him--just witnesses. In that context then, the government prosecutor argued to the jury " . . . isn't it reassuring to know the government does not bring criminal charges against someone until they are sure they have the evidence to convict them"; and further argued to the jury " . . . as surely as there is a pile of

exhibits of evidence sitting before you and as surely as you heard testimony from the witness stand, I tell you there was a conspiracy in this case and that when Hull and Schremser, Chuck, Gene, John and Tim Phebus and Harold Scully testified, they told you the truth."

REASONS FOR GRANTING THE WRIT

1.

PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY THE PROSECUTOR'S CONDUCT DURING CLOSING ARGUMENT, TELLING THE JURORS THE GOVERNMENT WITNESSES "TOLD YOU THE TRUTH", WHICH AMOUNTED TO VOUCHING FOR THE CREDIBILITY OF GOVERNMENT WITNESSES, AND FURTHER TELLING THE JURY THAT THE GOVERNMENT WAS "SURE . . . THEY HAVE THE EVIDENCE TO CONVICT . . ."

CERTIORARI SHOULD BE ALLOWED TO GIVE THIS COURT OPPORTUNITY TO SPEAK ON THE INCREASING PROBLEM IN THE LOWER FEDERAL COURTS OF PROSECUTORS RECEIVING CARTE BLANCHE TO TELL FEDERAL CRIMINAL JURIES THAT THE GOVERNMENT'S WITNESSES ARE TELLING THE TRUTH.

Although the proper role and standards of conduct to be expected from prosecutors were once well-stated by this Court in Berger v. United States, 295 U.S. 78, 88 (1935)--and its principles have resulted in numerous Court of Appeals' reversals of convictions obtained in violation of its teachings--[3/] this Court has yet squarely to address whether prosecutorial argument as here, which must be interpreted by the lay persons on the jury as the prosecutor's

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3. See, e.g., Greenberg v. United States, 280 F.2d 472, 474-75 (1 Cir. 1960); Hall v. United States, 419 F.2d 582 (5 Cir. 1969); Dunn v. United States, 307 F.2d 883, 886 (5 Cir. 1962); Gradsky v. United States, 373 F.2d 706, 709 (5 Cir. 1967); McMillian v. United States, 363 F.2d 165 (5 Cir. 1966); United States v. Handman, 447 F.2d 853, 856 (7 Cir. 1971); Ginsberg v. United States, 257 F.2d 950, 955 (5 Cir. 1958); United States v. Lamerson, 457 F.2d 371 (5 Cir. 1972).

own vouching for the credibility of government witnesses, violates due process of law in the context of a case as here, where witness credibility necessarily makes or breaks the government's case.

While the basic principles of Berger recently have been quoted with approval in context of reliance on "the ethical responsibility of the prosecutor," United States v. Ash, 413 U.S. 300, 320, 37 L.Ed. 2d 619, 632 (1973), that is, that the prosecutor may "'strike hard blows'" but not "'foul ones'", 37 L.Ed.2d at 633, not since Lawn v. United States, 355 U.S. 339, 359, n. 15, 2 L.Ed.2d 321, 335, n. 15 (1958), has this Court considered whether complained-of prosecutorial argument goes beyond the permissible bounds when a government witness' credibility is vouched for. In Lawn, absent objection

to the argument,[4/] this Court held the statement "not improper" because "The Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury . . ." Ibid.

Prior to Lawn, this Court considered a comparable issue in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129 (1940), similarly resolving it against the defendants. In the dissenting opinion of Mr. Justice Roberts, Id. at 254, 263, 84 L.Ed. at 1184, 1189, he would reverse based upon government counsel's closing argument.

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4. "We vouch for [the witnesses] because we think they are telling the truth." Ibid. At bar, there was objection. (Tr. 1580)

But since Lawn, it appears this Court has not chosen to take a case presenting the closing argument issues here presented. And the Court of Appeals cases refusing to reverse based upon prosecutorial statement of belief in their witnesses' veracity[5/] rely so heavily upon the principles on which the footnote in Lawn disposed of the issue, that it is time for this Court seriously to consider whether its statement in Lawn is to continue as a foundation for what appears to be a continuing serious miscarriage of justice.

* * *

More compelling than the footnote in Lawn, we submit, is the following concept, which, we submit, should govern the

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5. See, e.g., United States v. Kuta, 518 F.2d 947 (7 Cir. 1975); United States v. Creamer, 555 F.2d 612 (7 Cir. 1977).

resolution of this issue:

> "The question is not whether meant 'to insinuate' that his statement was based upon personal knowledge. The question is what the jury probably thought." United States v. Handman, 447 F.2d 853, 856 (7 Cir. 1971). (Emphasis added.)

* * *

Here, what the prosecutor did must have communicated to the jury, in context,[6/] that he vouched for the credibility of the government's witness,[7/] over and

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6. The impact of improper argument by the government must be considered, not only as to itself, but also in context with the entire trial. See United States v. Harding, 525 F.2d 84, 91 (7 Cir. 1975).

7. A recent Seventh Circuit case holding the prosecution improperly vouched for the credibility of its witnesses and that such misconduct constituted prejudicial error is United States v. Phillips, 527 F.2d 1021, 1023-24 (7 Cir. 1975), in which the court stated:

(Footnote continued on p. 16.)

above the evidence before the jury at trial. Over defense objection (Tr. 1580), the prosecutor was allowed to tell the jury:

> " . . . as surely as there is a pile of exhibits, of evidence

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Footnote 7 continued:

> " . . . the testimony of the witnesses sharply conflicted and the jury had to weigh the credibility of each witness to decide the case. There were no steps taken to mitigate the error. Indeed, the court may have reinforced it when defense counsel's objection was overruled. It is likely, then, that the jury was substantially swayed by the error.
>
> For the reasons herein stated, we conclude, that the statements of the prosecuting attorney were highly prejudicial and erroneous. It is most probable that the defendant did not receive a fair trial to which he was entitled." (Emphasis added.)

> sitting before you and as surely as you heard testimony from the witness stand, I tell you there was a conspiracy in this case and that when Hull and Schremser, Chuck, Gene, John and Tim Phebus and Harold Scully testified, they told you the truth." (Tr. 1580) (Emphasis added.)

Further, the following statements were made:

> "It has been a long . . . and important case and it is particularly important because there are three people on trial . . . who have not yet been brought to justice . . ." (Tr. 1552)

and

> "Mr. Inendino was not charged in the first indictment (but) he was charged in the second . . . Isn't it reassuring to know the government does not bring criminal charges against someone until they are sure they have the evidence to convict them?" (Tr. 1578)

Defendant maintains on appeal, as he did at trial, that he did not participate in any conspiracy, and that the government witnesses bore false witness against him. It was in this vein that Inendino's counsel commented in his opening statement that Inendino had not been charged in the first indictment, but had in the second, which was returned some eight months later.

Viewed separately, the above assertions by the prosecutor are damning enough. Viewed together (as the jury viewed them) they are devastating to the presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt.

And they cannot be considered as properly invited-reply to anything that

defense counsel said in argument.

The comments described above are like those made in Hall v. United States, 419 F.2d 582, 587 (5 Cir. 1969), wherein the court, in characterizing as "not defensible" the statement (made by the prosecutor in argument) "we try to prosecute only the guilty," said:

> "This statement takes guilt as a predetermined fact. The remark is, at the least, an effort to lead the jury to believe that the whole governmental establishment had already determined appellant to be guilty on evidence not before them. . . . Or, arguably it may be construed to mean that as a pretrial administrative matter the defendant has been found guilty as charged else he would not have been prosecuted, and that the administrative level determination is either binding upon the jury or else highly persuasive to it. Appellant's trial was held and the jury impaneled to pass on his guilt or innocence, and he was clothed

> in the presumption of innocence. The prosecutor may neither dispense with the presumption of innocence nor denigrate the function of the trial nor sit as a thirteenth juror." (Footnote omitted.)

Also on point, is McMillian v. United States, 363 F.2d 165, 168-169 (5 Cir. 1966), wherein the court held the comment by the prosecutor that, "These officers, when they make a case, they've got to convince our office that they've got a case and then we--" was reversible error. In so holding, the court, in words ever so pertinent to the case at bar, said:

> " . . . We believe the applicable rule to have a broader base than merely the exclusion of personal opinions as to guilt . . . The inquiry should be whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the

> prosecutor was convinced of the accused's guilt." Id. at 169. (Emphasis added.)

Accord, United States v. Cummings, 468 F. 2d 268, 278 (9 Cir. 1972).

Within the context of this case--where the evidence against defendant was thin, if not non-existent--the prosecution plainly embarked on a deliberate and wilful course of prosecutorial misconduct evidencing a design improperly to prejudice the defendant, wherein the prosecution made comments which were unprovoked and neither trivial nor few. See United States v. Gonzalez, 488 F.2d 833, 836 (2 Cir. 1973).

To resolve serious questions constantly occurring in the federal criminal justice system when overzealous prosecutors tell juries that their witnesses are

telling the truth--and when courts of appeal all-too-consistently nonetheless affirm because the prosecutor did not overtly tell the jury he was relying upon extra-judicial matters in formulating his opinion--certiorari should be allowed. And, upon consideration of the merits, defendant's convictions should be reversed, due to the pronounced and persistent misconduct of the prosecutor, which rendered it highly unlikely, if not impossible, for defendant to receive that fair trial to which he is constitutionally entitled.

2.

THE COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO SEQUESTER THE JURY UPON DEFENSE REQUEST AND REPRESENTATION THAT PREJUDICIAL NEWSPAPER ARTICLES WERE TO BE (AND WHICH IN FACT WERE) PUBLISHED DURING THE TRIAL.

A. This error was aggravated and compounded when the court admonished the jurors,

the night before the anticipated articles in fact appeared, that the court "knew" the jurors would tell the court they had not read the anticipated articles.

B. Similarly, defendant was further deprived of a fair trial and a fair opportunity to lay a foundation in the record as to possible juror prejudice, by the court's insistence on questioning the jurors en masse rather than individually as to whether or not any of them had read the extremely prejudicial articles which in fact appeared in two local newspapers.

There was no newspaper reportage during the entire two weeks duration of the trial, until the night before and the morning of the closing arguments to the jury. Upon learning of the possibility that publication concerning the trial would occur, defense moved the jury be sequestered to prevent their being affected by the prospective prejudicial reading matter. The court, declining to immunize the jury, denied defendant's

motion (Tr. 1680) and instead--after informing the jury there was a likelihood that newspaper articles concerning the trial would appear in the newspapers, not to watch television or listen to the radio or to talk to anybody about the case. The court then stated to the jury, "I know you are going to tell me tomorrow that you haven't read anything about this case." (Tr. 1676)

The next morning, just before the court's instructions to the jury, defense counsel read into the record two articles which had appeared in the morning newspapers and which (the defendant contends, to his prejudice) reported alleged death threats by defendant to government witnesses and implied that defendant was

involved with crime syndicate operations.[8/]

---

8. The Chicago Sun-Times dated March 7, 1978, morning edition reported as follows:

> "Guard Four Fraud Trial Witnesses After Threats." "Special provisions were arranged for Charles Phebus and Richard Hull after they allegedly received death threats."
>
> "Both Hull and Schremser were named as unindicted co-conspirators in the alleged conspiracy that authorities believe had ties to the crime syndicate operations."

The Chicago Tribune article, the morning edition of March 7, 1978 reported as follows:

> "Four government witnesses in half-million dollar insurance fraud conspiracy trial have been put under protection after alleged death threats from two defendants in the case Court documents disclosed Monday."
>
> "McKillip and Inendino also face a Grand Jury indictment on charges of transporting trucks across state lines. Investigators say they ran a Cicero trucking firm out of business that had leased vehicles to crime syndicate boss, James 'Turk' Turillo. One government witness,

(Footnote continued on p. 26.)

Based on the court's denial of his motion to sequester made prior to the appearance of the articles, defendant moved for a mistrial; but the court denied his motion. (Tr. 1686, 1689)

The court then inquired of the jurors

Footnote 8 continued:

> Richard Hull, was granted protection after McKillip allegedly threatened his life. Another witness, Charles Phebus, was put under the protection program because of a death threat allegedly made to him by Capitano."
>
> "Although Court documents gave no details of the alleged threats, they are said to have occurred before the trial began, but after the witnesses began cooperating with prosecutors. Two other witnesses, Eugene Phebus and Thomas Schremser, were given protection because they feared reprisal by McKillip and Inendino, although Court documents disclose no specific threats against them."

collectively whether they had read any newspapers since receiving the court's admonition not to. Upon receiving no response from the jurors, the court proceeded to instruct them. (Tr. 1698)

In view of the adverse notification to the court by defense counsel that publication which might be prejudicial in nature would occur, the court should have, in the proper exercise of its discretion, sequestered the jury.

While this Court apparently has not had occasion to address itself directly to the problem of sequestration and jury interrogation when prejudicial matter is anticipated, and in fact is published during the trial, two seminal cases touch upon the principles involved. In Sheppard v. Maxwell, 384 U.S. 333, 363, 16 L.Ed.2d

600, 620 (1966), overturning a State conviction on grounds that prejudicial publicity so permeated the trial as to render a constitutionally fair trial impossible under the circumstances, this Court noted:

> "[S]equestration of the jury was something the judge should have raised sua sponte with counsel."

And in Marshall v. United States, 360 U.S. 310, 312, 3 L.Ed.2d 1250, 1252 (1959), reversing for jury exposure to prejudicial publicity, this Court noted:

> "The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. . . . Generalizations beyond that statement are not profitable, because each case must turn on its special facts." (Emphasis added.)

In the instant case the court's

admonition to the jury (given immediately after telling them that it was likely publication would occur) was such that even if a juror had read one of the articles, such juror would likely have been rendered so extremely timid and cautious about responding that he or she had violated the court's instruction that individual rather than collective questioning would have been the more proper course of action for the court to follow.

Defendant contends here that the trial judge's directive admonition to the effect that he knew that none of the jurors would tell him they had read anything about this case constitute those "special circumstances" referred to in United States v. Rizzo, 409 F.2d 400, 402 (9 Cir. 1969), without which collective rather than individual inquiry is acceptable.

By virtue of the trial court's directive admonition to the jury, he created a "sensitive situation" such as is addressed in United States v. Perrotta, 553 F.2d 247 (1 Cir. 1977), and which created a situation where individual inquiry would have been the preferred course from the outset.

Because the trial court wrongly refused to sequester the jury in the face of almost certain prejudicial publicity concerning the case and then compounded the error both by issuing a powerfully directive admonition concerning the court's knowledge that the jurors would not tell the court they had read any of the articles and by refusing to conduct an individual inquiry of the jurors regarding their exposure to said publicity, defendant was denied his constitutionally

protected right to a fair trial, in that he was precluded from effectively determining whether any jurors had in fact been prejudiced as a result of such publicity.

The spirit of due process, as embodied in this Court's opinions in Sheppard v. Maxwell and Marshall v. United States, supra, suggests certiorari should be allowed to permit this Court to deal with the delicate issues therein presented.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF COURT OF APPEALS,
May 31, 1979

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED APRIL 17, 1979)

May 31, 1979

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	) Appeal from) the United) States Dis-
Nos. 78-1529 and 78-1790 vs.	) trict Court) for the North-) ern District
SAM BENNIE CAPITANO and JAMES V. INENDINO, Defendants-Appellants	) of Illinois,) Eastern Div-) ision

No. 76-CR-876
John F. Grady,
Judge.

O R D E R

Defendants were convicted before a jury of transporting forged checks in interstate commerce and conspiracy to do the same. Inendino was found guilty under the conspiracy count of the indictment and eleven substantive counts, and Capitano under those same counts and one additional substantive count. Each defendant was sentenced to five years on each count, the sentences to run concurrently. We find their various claims of trial error to be without merit and affirm the convictions.

1. Closing Argument

Inendino argues that in closing argument the prosecutor stated his personal belief that the government witnesses were telling the truth. The statement complained of was as follows:

> . . . as surely as there is a pile of exhibits, of evidence sitting before you and as surely as you heard testimony from the witness stand, I tell you there was a conspiracy in this case and that when Hull and Schremser, Chuck, Gene, John and Tim Phebus and Harold Scully testified, they told you the truth.

As in United States v. Kuta, 518 F.2d 947, 954-955 (7th Cir.), cert. denied, 423 U.S. 1014 (1975), the quoted passage follows a summary of the evidence. It is apparent from the context here, as it was in that case, that the challenged statement was intended to be an argument based on the evidence the prosecutor had just summarized and not a representation that he personally believed the testimony of the witnesses. We believe any listener would so understand it.

Inendino complains that the prosecutor improperly argued that Inendino had threatened government witness Hull and in so arguing misstated the record. The prosecutor's statement is as follows:

> Now I suggest to you that the threat was very real, that Mr. Hull knew about. It was through Mr. McKillip concerning Mr. Inendino's involvement in the case.

The prosecutor went on to remind the jury that Hull was told by another conspirator, McKillip, that Inendino would provide "protection," and what that meant to Hull.

There was evidence that Inendino had told the Phebus brothers, who were other conspirators, that he would kill his men if necessary, that McKillip had told Hull that Inendino would provide "protection," and that to Hull this meant that any person who fell out of line would be dealt in "a final manner." The argument concerning threats to Hull was a reasonable inference from the evidence. The prosecutor is not limited to a mere recital of the facts but could properly draw inferences concerning Inendino's role in the scheme and argue those inferences to the jury.

Both defendants complain of the prosecutor's statement during closing argument, " . . . isn't it reassuring to know the government does not bring criminal charges against someone until they are sure they have the evidence to convict them."

Following an objection by defense counsel, the trial judge ruled that the comment was improper and instructed the jury that the matter of what the evidence

proves was for them to determine from the facts and not from opinion and that closing arguments were not facts and it was for the jury to determine what the evidence showed. Under all the circumstances, we believe that this incident constituted harmless error.

Standing alone the prosecutor's statement would be cause for serious concern, but considered in context it was not prejudicial, even though unfortunately phrased. It was made in response to an argument Inendino's counsel had advanced in his opening statement and implied in cross-examination of witnesses that the case against Inendino was a frame-up. An ingredient of this argument was an inference Inendino's counsel sought to have drawn from the fact that Inendino was not named in the superseded first indictment, viz., that the evidence against Inendino was a belated invention. At the time the prosecutor made the statement complained of, counsel for Inendino had not disclaimed an intention to charge the prosecuting attorneys with complicity in the frame-up, although he did exclude them from that charge in his subsequent closing argument for Inendino. The prosecutor's statement was made in response to the frame-up charge and in particular in an effort to refute the suggestion that the failure to include Inendino in the first and later superseded indictment was an indication that the evidence against him was a relatively late concoction. Although we do not condone the expression chosen by the prosecutor, we think the statement, in the context in which it appeared, was understood by the jury for what it was, viz., a part of an effort to

rebut the frame-up charge and not an attempt to buttress the prosecution's case by relying on the pre-indictment opinions of the prosecution.

Capitano argues that the prosecutor misstated evidence to the jury in his rebuttal argument by referring to "Mr. Capitano's home phone number" instead of that defendant's "office" phone number. This reference was immediately objected to, and the prosecutor thereupon apologized, admitted the mistake, and stated that he should have said "John Hancock office." In addition, at the beginning of the judge's instructions to the jury, the error was noted and corrected. This inadvertent mistake by the prosecutor resulted in no prejudice to Capitano. An unintentional misstatement by the prosecutor which is quickly corrected is not a ground for reversal. United States v. Grooms, 454 F.2d 1308, 1311-1312 (7th Cir.), cert. denied, 409 U.S. 858 (1972).

In summary, a reading of the closing arguments in their entirety convinces us that the statements complained of do not constitute prejudicial error.

2. Limitations on Cross-Examination

Inendino complains that his counsel was precluded from asking the witness Hull whether Hull had signed an affidavit in March 1976 stating that he last worked in March 1975. The purpose of the inquiry was to impeach Hull's testimony that "he imagined" that he had worked after March 1975. Although we would have allowed the

question if we had been in the trial judge's place, the exclusion of this peripheral evidence did not amount to prejudicial error.

Inendino also complains that the trial judge sustained objection to cross-examination of witness Charles Phebus concerning whether he knew that the government's recommendation of dismissal of some of the criminal charges pending against him would have the ultimate effect of significantly reducing any potential sentence he might receive. The defendant was permitted to elicit from Phebus that eleven charges had been dropped and that each of those charges carried a prison sentence. The benefit the witness perceived from the dismissal of the charges was apparent from the evidence the jury heard, and no prejudice resulted to Inendino from the judge's refusal to allow embellishment.

Inendino also argues that his counsel was improperly precluded from inquiring into the current employment of witnesses Chuck Phebus and Schremser. The judge foreclosed examination on this subject because of a reasonable basis for fear expressed by the witnesses. We find no error and no prejudice in this ruling.

Inendino also argues that the court improperly sustained objection to cross-examination of Chuck Phebus with respect to whether Gene Phebus had told Schremser in Chuck's presence that Gene had been involved in a truck hijacking and that the scheme which was the subject matter of the instant indictment was bigger and better than the hijacking. In so arguing, Inendino misstates the record. His

counsel asked Chuck Phebus without objection whether, in conversation with Tom Rich, Gene Phebus had said the check deal was "even bigger and better" than a hijacking and theft of trucks in which Gene had engaged in January 1974; and the witness answered no. The court sustained objection to the question whether the previous questions were the first the witness had heard of the hijacking matter, on the ground that the cross-examiner was bound by the witness' previous answers on this collateral matter. The judge could reasonably have viewed the question to which he sustained objection as an argumentative quibble with a previous answer on a collateral matter. Inendino also asserts error in the judge's refusal to allow an offer of proof on this matter, but the judge expressly stated that an offer could be made later during a recess, and apparently no offer was ever tendered. We find no error in this incident.

BY MR. MARKLEY:

Q. Did Mr. Capitano ever tell you while you were in Florida that he knew Mr. Bilodeau?

A. I do not know that for sure.

Q. Did Chuck ever tell you that he [Mr. Capitano or Chuck?] knew Mr. Bilodeau?

A. Yes, sir.

Q. What did Chuck say?

A. That he was good friends with Bilodeau.

Q. Who did Chuck say that --

A. Sam [Capitano] and Bilodeau were friends.

Q. Did Chuck ever meet Bilodeau that Chuck told you about?

A. That I do not know.

We understand this testimony as the trial judge did, i.e., as meaning that Chuck said Sam and Bilodeau were friends. On recross by counsel for Inendino, however, the following occurred:

Q. When did your brother Chuck tell you that he was good friends with Mr. Bilodeau?

A. He never told me that.

Q. Didn't you testify in answer to a question of Mr. Markley's just a little while ago when he was asking you questions, that Chuck said he was good friends with Bilodeau?

A. No, I didn't.

Q. You didn't say that?

A. No, I said he was good friends of Sam's.

Q. Did you say that?

A. As far as I know, no.

THE COURT: Mr. Echeles --

MR. ECHELES: Yes, your Honor?

THE COURT: The Court will say that the witness did not say that.

Then followed a colloquy in which Inendino's counsel and the court stated their disagreement over what the initial testimony had been.

Eventually, the judge had that initial testimony read to the jury. Thus the jury was allowed to make its own determination of which interpretation was correct. If any embarrassment to counsel resulted, he brought it on himself. We see no conceivable prejudice in this incident.

Capitano argues that the court improperly precluded his counsel from cross-examining Mrs. Bilodeau concerning whether she had engaged in a sexual relationship with Capitano. We are unable to perceive the relevance of this evidence. Capitano argued in his brief before us that the evidence would show she was biased against him. At oral argument, his counsel was unable to explain why this would follow. As we said in United States v. Harris, 542 F.2d 1283, 1302 (7th Cir.), cert. denied, 430 U.S. 934 (1976),

> We do not find that a sexual relationship will per se give rise to bias, either favorable or unfavorable.

During his oral argument, counsel for Capitano said he also had wanted to show that the witness, who testified that

Capitano telephoned her repeatedly, had herself telephoned Capitano repeatedly. A reading of her testimony, however, shows that she admitted that she and her husband had called Capitano a number of times. Counsel was not prevented from developing this line of inquiry further if he had chosen to do so. He was prohibited from inquiring into the sexual relationship, because he had not shown the court what the relevance of that relationship would be. We do not get from the witness' testimony the impression that contacts between Capitano and the Bilodeaus were primarily initiated by him rather than them. This afterthought argument by counsel is without merit.

Counsel for Capitano also stated on oral argument another contention not made in his brief, viz., that the judge had erred in excluding certain letters marked "Capitano Group Exhibit 5" which were allegedly written by Mrs. Bilodeau to Capitano after she first met him in Atlanta in 1974. Counsel argued that these letters might contradict testimony Mrs. Bilodeau had given on the stand. Counsel had seen the letters, of course, since they were purportedly written to and produced by his client. Nevertheless, when interrogated by us, he was unable to state how these letters tended to impeach Mrs. Bilodeau on any material matter. Nor did he state how they might otherwise bear on any relevant issue. We have read Mrs. Bilodeau's testimony, Capitano's offer of proof presented by cross-examining Mrs. Bilodeau outside the presence of the jury, and the letters themselves. After doing so, we are still

unable to perceive any relevance in the letters or in the fact of the witness' sexual relationship with Capitano.

3. Refusal to Sequester Jury and Interrogation of Jurors About Newspaper Stories

The afternoon before the submission of the case to the jury, defense counsel advised the court of the possibility that newspaper stories pertaining to the trial and the defendants were likely to appear and moved that the jury be sequestered. The court denied the motion but advised the jury that there might be newspaper stories and admonished them not to read the newspapers at all. No objections were made to the court's statement.

The following morning, after the appearance of stories in the Chicago Sun Times and the Chicago Tribune which would have been prejudicial if read by the jurors, counsel for the defendants brought the stories to the judge's attention and moved for a mistrial. The judge stated that he would conduct a collective voir dire of all the jurors to determine whether any of them had read the article and that if any had done so he would examine the jurors individually in camera. Defendants did not object but made suggestions relating to the scope of the inquiry. The judge then interrogated the jurors collectively and determined that no juror had read the newspaper stories.

On at least six prior occasions during the trial the judge had instructed the jury at the end of the day that, inter alia, they should not read any accounts of the case in the newspapers or listen to any comments about it on radio or television, if any such appeared.

The defendants argue that the court erred in refusing to sequester the jury and, further, that he failed to properly examine the jurors concerning their reading of the newspaper articles.

Sequestration of the jury is a matter for the discretion of the trial judge. If adequate steps are taken to insure that jurors are not exposed to prejudicial publicity, it is not error to refuse sequestration. Margolis v. United States, 407 F.2d 727, 732-733 (7th Cir.), cert. denied, 396 U.S. 833 (1969). Here the court repeatedly admonished the jury not to read newspaper stories concerning the case and interrogated them to determine whether they had obeyed these instructions. We cannot say that the collective examination of jurors concerning their compliance, rather than individual examination was an inadequate means of determining that no juror had read the stories. United States v. Margolis, supra, 407 F. 2d at 734-735; United States v. Barrett, 505 F.2d 1091, 1100 (7th Cir.), cert. denied, 421 U.S. 964 (1975). It is noteworthy that no objections were made at the time to the procedure the judge followed, except those concerning the failure to sequester the jury.

Defendants now argue that the court handled the matter in such a way as to

call the articles to the jurors attention and then discourage them from giving truthful answers to the questions concerning whether they had read the newspaper stories. Again, in the absence of objections made at the time of the procedures now challenged, and after a review of the transcript, we believe that there was neither error nor an abuse of discretion.

4. Sufficiency of Evidence on Substantive Counts Against Inendino

Inendino argues that there was insufficient evidence to support conviction of the substantive offenses of causing transportation of checks from Chicago to Boston, Massachusetts. He was acquitted of the count dealing with the transportation of forged checks from Chicago to Florida after a determination had been made to move the operation to Florida.

The government relies on the doctrine that when there is a conspiracy (and Inendino does not challenge the sufficiency of the evidence to establish conspiracy), and an act in furtherance of the conspiracy is committed, all of the conspirators are guilty of the substantive act by reason of their participation in the conspiracy. United States v. Peskin, 527 F.2d 71, 75-76 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); United States v. Joyce, 499 F.2d 9, 16 (7th Cir.), cert. denied, 419 U.S. 1031 (1974).

Although use of interstate facilities is a basis for jurisdiction only, and knowledge of such use is unnecessary for conviction, United States v. Peskin, supra, 527 F.2d at 78, there was ample evidence here that Inendino knew interstate transportation would be a necessary part of carrying out the conspiracy. That evidence showed the following: The Phebus brothers informed Inendino of the scheme prior to Labor Day 1974. He was shown a sample Hancock check. Through the Phebuses and McKillip, he learned that the checks had to be deposited in Chicago area banks, and that before money could be drawn from the accounts, the checks had to clear the banks on which they were drawn. Knowing that all the Hancock checks were drawn on a bank in Boston, Inendino could foresee that they would be transported interstate between Illinois and Massachusetts. Certain Hancock checks were deposited in the Chicago area banks and sent by them to the Boston bank through normal banking channels for payment, and the checks were returned to the Chicago area banks unpaid.

Withdrawals of the proceeds of the deposits of the Hancock checks could not be made from the Chicago area banks until the checks had been sent from Illinois to the Boston bank. Thus, in order for Inendino to receive any part of his compensation for participating in the scheme, the forged checks were required to be transported in interstate commerce, and Inendino must have known this. Therefore, interstate transportation of the checks was not only foreseeable by Inendino but essential to the scheme.

The transportation of the forged checks was in furtherance of the conspiracy and Inendino was chargeable with that transportation.

The government also points out that Inendino aided and abetted the substantive offenses by sharing in the criminal purpose and assisting in the accomplishment of that purpose. United States v. Martinez, 555 F.2d 1269, 1271-1272 (5th Cir. 1977). His conviction can also be supported on that theory.

5. Foundation for Computer Printouts

The government introduced documentary evidence of telephone calls and airline reservations. Records of telephone calls for the months of September and October 1975 were introduced through the testimony of a records custodian from the General Telephone Company of Florida. Airline reservation records for flights during August and September 1974 were introduced through the testimony of a records custodian from Eastern Airlines' Miami Florida office.

Capitano argues that there was an inadequate foundation for the admission of this evidence, because no computer expert testified that the computers that produced the records were programmed accurately to insure their reliability. He does not question the authenticity of the records or the recordkeeping procedures. While the foundation for this evidence might have been more extensive, see United States v. Scholle, 553 F.2d 1109, 1125 (8th Cir.), cert. denied, 434 U.S. 940

(1977), we believe that the requirements of Rule 803(6) of the Federal Rules of Evidence were satisfied.

The judgments of conviction are affirmed.

AFFIRMED.